Order Code RL30315

CRS Report for Congress

Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power

Updated February 1, 2008

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Prepared for Members and Committees of Congress

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Summary

The lines of authority between states and the federal government are, to a significant extent, defined by the United States Constitution and relevant case law. In recent years, however, the Supreme Court has decided a number of cases that would seem to reevaluate this historical relationship. This report discusses state and federal legislative power generally, focusing on a number of these "federalism" cases. The report does not, however, address the larger policy issue of when it is appropriate — as opposed to constitutionally permissible — to exercise federal powers.

The U.S. Constitution provides that Congress shall have the power to regulate commerce with foreign nations and among the various states. This power has been cited as the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers. In *United States v. Lopez* and subsequent cases, however, the Supreme Court did bring into question the extent to which Congress can rely on the Commerce Clause as a basis for federal jurisdiction.

Another significant source of congressional power is the Fourteenth Amendment, specifically the Equal Protection and Due Process Clauses. Section 5 of that amendment provides that Congress has the power to enforce its provisions. In the case of *Flores v. City of Boerne*, however, the Court imposed limits on this power, requiring that there must be a "congruence and proportionality" between the injury to be remedied and the law adopted to that end.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." While this language would appear to represent one of the most clear examples of a federalist principle in the Constitution, it has not had a significant impact in limiting federal powers. However, in *New York v. United States* and *Printz v. United States*, the Court did find that, under the Tenth Amendment, Congress cannot "commandeer" either the legislative process of a state or the services of state executive branch officials.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." Although this text is limited to preventing citizens from bringing diversity cases against states in federal courts, the Supreme Court has expanded the concept of state sovereign immunity further to prohibit citizens generally from bringing suits against states under federal law generally. There are exceptions to this limitation, however, and Congress also has a limited ability to abrogate such state immunity.

Finally, Congress has the power under the Spending Clause to require states to undertake certain activities as a condition of receiving federal monies. Such conditions, however, must be related to the underlying grant, and the financial consequences of non-compliance cannot be coercive.

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Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power

The lines of authority between states and the federal government are, to a significant extent, defined by the United States Constitution and relevant case law. In recent years, however, the Supreme Court has decided a number of cases that would seem to be a reevaluation of this historical relationship. This report discusses state and federal legislative power generally and focuses on a number of these "federalism" cases. The report discusses state and federal legislative power generally, and focuses on a number of these "federalism" cases.[1] Issues addressed include congressional power under the Commerce Clause and the Fourteenth Amendment; limits on congressional powers, such as the Tenth Amendment; and state sovereign immunity under the Eleventh Amendment. The report does not, however, address the much larger federalism issue of when it is appropriate — as opposed to constitutionally permissible — for federal powers to be exercised.

Powers of the States

States may generally legislate on all matters within their territorial jurisdiction. This "police power" does not arise from the Constitution, but is an inherent attribute of the states' territorial sovereignty. The Constitution does, however, provide certain specific limitations on that power. For instance, a state is relatively limited in its authority regarding the regulation of foreign imports and exports[2] or the conduct of foreign affairs.[3] Further, states must respect the decisions of courts of other states,[4] and are limited in their ability to vary their territory without congressional

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[1] Portions of this report were prepared by Kristin Thornblad, legal intern.

[2] *See e.g.*, U.S. Const. Art. I, §10, cl. 2 ("No State shall . . . lay any Impost or Duties on Imports or Exports.")

[3] "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const., Art. I, § 10, cl. 3.

[4] "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. Const. Art. IV, §1. This "Full Faith and Credit Clause" gives Congress what amounts to enforcement authority over the required recognition by each state of the judgments, records, and legislation of other states.

permission [5] In addition, the Supreme Court has found that states are limited in their ability to burden interstate commerce.[6]

Powers of the Federal Government

The powers of the federal government, while limited to those enumerated in the Constitution,[7] have been interpreted broadly, so as to create a large potential overlap with state authority For instance, Article I, § 8, cl 18 provides that "[t]he Congress will have power . . To make all laws which will be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof " Early in the history of the Constitution, the Supreme Court found that this clause enlarges rather than narrows the powers of Congress [8]

Congress has broad financial powers, including the power to tax and spend in order to pay debts and provide for the common defense and general welfare of the United States.[9] Congress also has the power to borrow money and to appropriate money from the United States Treasury.[10] The purposes for which Congress may tax and spend are very broad and are not limited by the scope of other enumerated powers under which Congress may regulate [11] On the other hand, Congress has no power to regulate "for the general welfare," but may only tax and spend for that purpose

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[5] "... [N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as Congress." U S. Const., Art IV, §3, cl 1

[6] Gibbons v Ogden, 22 U S (9 Wheat) 1 (1824)

[7] Article I, §1, of the Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States " Unlike a typical grant of power to states Article I, §1, does not grant to Congress "all legislative power," but rather grants to Congress only those specific powers enumerated in §8 and elsewhere in the Constitution.

[8] As stated by Chief Justice Marshall in McCulloch v Maryland, 17 U S. (4 Wheat) 316 (1819) "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional "

[9] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States, but all Duties, Imposts and Excises shall be uniform throughout the United States " U S Const., Art I, §8, cl 1.

[10] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law " U S Const., Art I, §9, cl 7.

[11] United States v Butler, 297 U S 1 (1936).

Congress also has broad authority over the commercial interests of the nation, including the power to regulate commerce,[12] to establish bankruptcy laws,[13] to coin money,[14] to punish counterfeiters,[15] to establish post offices and post roads,[16] and to grant patents and copyrights.[17] The Commerce Clause, discussed in more detail below, is one of the most far-reaching grants of power to Congress. Regulation of interstate commerce covers all movement of people and things across state lines, including communication and transportation.

Congress has broad powers over citizenship, including the power to define the circumstances under which immigrants may become citizens,[18] and to protect the rights of those persons who have citizenship. The Fourteenth Amendment gives Congress the power to enforce the guarantees of the Fourteenth Amendment, including the right to due process and equal protection.[19] This power extends specifically to the power of Congress to protect the rights of citizens who are at least 18[20] to vote regardless of race, color, previous condition of servitude,[21] or sex.[22] Congress may also regulate the time, place, and manner of federal elections,[23] and

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[12] "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Article I, § 8, cl. 3.

[13] U.S. Const., Art. I, §8, cl. 4.

[14] U.S. Const., Art. I, §8 cl. 5.

[15] U.S. Const., Art. I, §8, cl. 6.

[16] U.S. Const., Art. I, §8, cl. 7.

[17] U.S. Const., Art. I, §8, cl. 8.

[18] "The Congress shall have power . . . To establish an uniform Rule of Naturalization." U.S. Const., Art. I, § 8, cl. 4. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const., Amend. XIV, §1.

[19] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, §1. Congress shall have power to enforce, by appropriate legislation, the provisions of this article. *Id.* at §5.

[20] U.S. Const., Amend. XXVI.

[21] U.S. Const., Amend. XV.

[22] U.S. Const., Amend. XIX.

[23] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., Article I, §4, cl. 1. While the Fifteenth Amendment and the other voting rights guarantees noted above protect only against state action, congressional authority under this clause includes protection of the electoral process against private interference. A variety of enactments can be traced to this authority, including campaign finance laws and the Hatch Act (insofar as it applies to federal elections).

judge the result of such elections.[24] Congress also has a number of other powers relating to elections and appointments.[25]

Congress has the power and authority to purchase and administer property, and has power over those jurisdictions that are not controlled by states, such as the District of Columbia and the territories.[26] Congress is limited by the Fifth Amendment, however, in the taking of private property without compensation.[27] Congress has numerous powers related to war and the protection of the United States and its sovereign interests.[28]

The Commerce Clause

As noted above, the U.S. Constitution provides that Congress shall have the power to regulate commerce with foreign nations and among the various states.[29] This power has been cited as the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers. In *United States v. Lopez*,[30] however, the Supreme Court brought into question the extent to which Congress can rely on the Commerce Clause as a basis for federal jurisdiction.

Under the Gun-Free School Zones Act of 1990, Congress made it a federal offense for "any individual knowingly to possess a firearm at a place that the

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[24] "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Article I, §5, cl. 1. The House and the Senate act as judicial tribunals in resolving contested election cases.

[25] *See, e.g.*, U.S. Const., Amend. XIV, §2 (apportionment).

[26] "The Congress shall have power ... To exercise exclusive Legislation in all Cases whatsoever, over such District ... as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Article I, §8, cl. 17. "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ..." Article IV, § 3, cl. 2.

[27] "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. Implicit in the Fifth Amendment's requirement that just compensation be paid for private property that is taken for a public use is the existence of the government's power to take private property for public use.

[28] *See, e.g.*, U.S. Const. Art. I, § 8, cl. 10 ("The Congress shall have power ... To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"), U.S. Const., Art. I, § 8, cl. 11 ("... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"), U.S. Const., Art. I, §8, cl. 12 ("To raise and support Armies ...").

[29] U.S. Const., Art. I, §8, cl. 3.

[30] 514 U.S. 549 (1995).

individual knows, or has reasonable cause to believe, is a school zone."[31] In *Lopez*, the Court held that, because the act neither regulated a commercial activity nor contained a requirement that the possession was connected to interstate commerce, the act exceeded the authority of Congress under the Commerce Clause. Although the Court did not explicitly overrule any previous rulings upholding federal statutes passed under the authority of the Commerce Clause, the decision would appear to suggest new limits to Congress's legislative authority.

The scope and extent of the Commerce Clause does not appear to have been of particular concern to the framers of the Constitution.[32] There are indications that the founding fathers considered the federal regulation of commerce to be an important power of the new Constitution primarily as a means of facilitating trade and of raising revenue.[33] While the Anti-Federalists argued that the new Constitution gave too much power to the federal government, they apparently did not raise significant objections to the granting of power to regulate interstate commerce.[34]

The Supreme Court, however, developed an expansive view of the Commerce Clause relatively early in the history of judicial review. For instance, Chief Justice Marshall wrote in 1824 that "the power over commerce . . . is vested in Congress as absolutely as it would be in a single government . . ." and that "the influence which their constituents possess at elections, are . . . the sole restraints" on this power.[35] However, the issue in most of the early Supreme Court Commerce Clause cases dealt not with the limits of Congressional authority, but on the implied limitation of the Commerce Clause on a state's ability to regulate commerce.[36]

It has been suggested that the Commerce Clause should be restricted to the regulation of "selling, buying, bartering and transporting."[37] In fact, much of the federal legislation approved of by the Supreme Court early in the 20th century did

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[31] 18 U.S.C. §922(q)(1)(A).

[33] Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 443-44 (1941); Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 Vanderbilt Law Review 1019, 1022-24 (1988). Those materials which do address Congressional control over commerce focus on the necessity of uniformity in matters of foreign commerce, although the drafters clearly intended domestic commerce to be regulated as well. P. Kurland & R. Lerner, THE FOUNDER'S CONSTITUTION 477-528 (1987).

[33] Alexander Hamilton, CONTINENTALIST, No. 5, 18 April 1782 (Paper 3 75-82) as reprinted in P. Kurland & R. Lerner, *supra* note 32 ("The vesting of the power of regulating trade ought to have been a principal object of the confederation for a variety of reasons. It is as necessary for the purposes of commerce as of revenue.")

[34] Greenspan, *supra* note 32 at 1023.

[35] Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 197-98 (1824).

[36] *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

[37] United States v. Lopez, 514 U.S. at 593 (Thomas, J., dissenting).

relate to issues such as the regulation of lottery tickets,[38] the transporting of adulterated food,[39] and the interstate transportation of prostitutes.[40] Moreover, during the early 1900s, the Supreme Court struck down a series of federal statutes that attempted to extend commerce regulation to activities such as "production," "manufacturing,"[41] and "mining."[42]

Starting in 1937, however, with the decision in *NLRB v. Jones & Laughlin Steel Corporation*,[43] the Supreme Court held that Congress has the ability to protect interstate commerce from burdens and obstructions that "affect" commerce transactions. In the *NLRB* case, the court upheld the National Labor Relations Act, finding that by controlling industrial labor strife, Congress was preventing burdens from being placed on interstate commerce.[44] Thus, the Court rejected previous distinctions between the economic activities (such as manufacturing) that led up to interstate economic transactions, and the interstate transactions themselves. By allowing Congress to regulate activities that were in the "stream" of commerce, the Court also set the stage for the regulation of a variety of other activities that "affect" commerce.

Subsequent Court decisions found that Congress had considerable discretion in determining which activities "affect" interstate commerce, as long as the legislation was "reasonably" related to achieving its goals of regulating interstate commerce.[45] Thus the Court found that in some cases, events of purely local commerce (such as local working conditions) might, because of market forces, negatively affect the regulation of interstate commerce, and thus would be susceptible to regulation.[46] The Court has also held that an activity which in itself does not affect interstate commerce could be regulated if all such activities taken in the aggregate did affect interstate commerce.[47] Under the reasoning of these cases, the Court has upheld many diverse

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[38] Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903).

[39] Hippolite Egg Co. v. United States, 220 U.S. 45 (1911).

[40] Hoke v. United States, 227 U.S. 308 (1913).

[41] United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

[42] Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936).

[43] 301 U.S. 1 (1937).

[44] 301 U.S. at 41.

[45] United States v. Darby, 312 U.S. 100 (1941)(approving legislation relating to working conditions).

[46] 312 U.S. at 121.

[47] Wickard v. Filburn, 317 U.S. 111 (1942).

laws, including laws regulating production of wheat on farms,[48] racial discrimination by businesses,[49] and loan-sharking.[50]

The *Lopez* case was significant in that it is the first time since 1937 that the Supreme Court struck down a federal statute purely based on a finding that Congress had exceeded it powers under the Commerce Clause.[51] In doing so, the Court revisited its prior cases, sorted the commerce power into three categories, and asserted that Congress could not go beyond these three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities that "affect" commerce.[52]

Within the third category of activities that "affect commerce," the Court determined that the power to regulate commerce applies to intrastate activities only when they "substantially" affect commerce.[53] Still, the Court in *Lopez* spoke approvingly of earlier cases upholding laws that regulated intrastate credit transactions, restaurants utilizing interstate supplies, and hotels catering to interstate guests. The Court also recognized that while some intrastate activities may by themselves have a trivial effect on commerce, regulation of these activities may be constitutional if their regulation is an essential part of a larger economic regulatory scheme. Thus, the Court even approved what has been perceived as one of its most expansive rulings, *Wickard v. Filburn*, which allowed the regulation of the production and consumption of wheat for home consumption.[54]

The Court in *Lopez* found, however, that the Gun-Free School Zones Act fell into none of the three categories set out above. It held that it is not a regulation of channels of commerce, nor does it protect an instrumentality of commerce. Finally, its effect on interstate commerce was found to be too removed to be "substantial." The Court noted that the regulated activity, possessing guns in school, neither by

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[48] Id.

[49] *See* Heart of Atlanta Motel v. United States, 370 U.S. 241 (1964), Katzenbach v. McClung, 379 U.S. 241 (1964).

[50] Perez v. United States, 402 U.S. 146 (1971).

[51] Herman Schwartz, *Court Tries to Patrol a Political Line*, Legal Times 25 (May 8, 1995).

[52] The Court failed to note that to some extent, the three categories are intertwined. For instance, the first category, the regulation of "streams" or "channels" of commerce, allows regulation of the creation, movement, sale and consumption of merchandise or services. But the initial extension of the "streams" of commerce analysis by the Court to intrastate trade was justified by the "effect" of these other activities on commerce. *See* NLRB v. Jones & Laughlin, 301 U.S. 1, 31 (1936). Similarly, the second category, which allows the regulation of such instrumentalities of commerce as planes, trains or trucks, is also based on the theory that a threat to these instrumentalities "affects" commerce, even if the effect is local in nature. Southern Railway Company v. United States, 222 U.S. 21, 26-27 (1911)(regulation of intrastate rail traffic has a substantial effect on interstate rail traffic). Thus, the final category identified by the Court appears to be a catch-all for all other activities which "substantially affect" commerce.

[53] 514 U.S. at 559.

[54] Wickard v. Filburn, 317 U.S. 111 (1942).

itself nor in the aggregate affected commercial transactions.[55] Further, the statute contained no requirement that interstate commerce be affected, such as that the gun had been previously transported in interstate commerce.[56] Nor was the criminalization of possession of a gun near a school part of a larger regulatory scheme that did regulate commerce.[57] Finally, the Court indicated that criminal law enforcement is an area of law traditionally reserved to the states.[58] Consequently, the Court found that Congress did not have the authority to pass the Gun-Free School Zone Act.

It should be noted that the *Lopez* Court purported to be limiting, but not overruling, prior case law that had supported an expansive interpretation of the commerce clause. Consequently, most existing federal laws, which have traditionally been drafted to be consistent with this case law,[59] would survive constitutional scrutiny even under *Lopez*. However, in at least one significant case, Congress passed a law, the Violence Against Women Act, that seemed to invoke the same concerns that the Court found in *Lopez*. Consequently, the relevant portion of that act was struck down in *United States v. Morrison*.[60]

In *Morrison*, the Court evaluated whether 42 U.S.C. § 13981, which provides a federal private right of action for victims of gender-motivated violence, was within the power of Congress to enact under the Commerce Clause. In *Morrison*, the victim of an alleged rape brought suit against the alleged rapist, arguing that this portion of the act was sustainable because it addressed activities that substantially affect interstate commerce.[61] The Court, however, noted that unlike traditional statutes based on the commerce clause, the activity in question had nothing to do with commerce or an economic enterprise. This point had been made previously in *Lopez*, and here the Court reaffirmed the holding that in order to fall under the acceptable category of laws that "substantially affect commerce," the underlying activity itself must generally be economic or commercial.[62] As gender-motivated violence does not

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[55] 514 U.S. at 564. The Court rejected arguments that possession of guns in school affected the national economy by its negative impact on education. Id.

[56] 514 U.S. at 561.

[57] 514 U.S. at 560.

[58] 514 U.S. at 580 (Kennedy, J., concurring). The Court has reiterated its concern over extending Commerce Clause powers to Congress in areas of the law traditionally reserved to the states. *See, e.g.*, Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159, 174 (2001) (rejecting an interpretation of the Clean Water Act which allowed regulation of nonnavigable, isolated wetlands as infringing upon the "traditional and primary state power over land and water use").

[59] *See, e.g.*, 18 U.S.C. §247 (2000)(forbidding obstruction of persons in the free exercise of religious beliefs where the offense "is in or affects interstate or foreign commerce.")

[60] 529 U.S. 598 (2000).

[61] *Id.* at 609.

[62] The requirement that a commerce clause regulation be economic or commercial has been influential in a number of subsequent statutory interpretation cases. In Jones v. United

(continued..)

inherently relate to an economic activity, the Court held that it was beyond the authority of Congress to regulate

In the case of *Gonzales v. Raich*,[63] the Court evaluated an "as applied" challenge to the Controlled Substances Act as regards obtaining, manufacturing, or possessing marijuana for medical purposes. The case was brought by two seriously ill residents of California who used marijuana in compliance with the California Compassionate Use Act of 1996.[64] The challenge was based on the argument that the narrow class of activity being engaged in — the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law — did not have a substantial impact on commerce, and thus could not be regulated under the Commerce Clause.[65]

In upholding the application of the Controlled Substances Act in the *Raich* case, the Court relied on its decision in *Wickard v. Filburn*,[66] which held that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[67] The *Wickard* case upheld the application of the Agricultural Adjustment Act of 1938,[68] which was designed to control prices by regulating the volume of wheat moving in interstate commerce. The Court in

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[62] (.. continued)
States, 529 U.S. 848 (2000), a criminal defendant challenged his conviction under 18 U.S.C. § 844(i), which, in part, makes it a crime to destroy by fire or explosive a building "used" in interstate commerce. Applying the statutory canon that one should interpret a statute to avoid constitutional doubt, Jones v. United States, 526 U.S. 227, 239 (1999), the Court held that the statute did not apply to a private residence that was "used" as collateral to obtain and secure a loan, "used" to obtain insurance, and "used" to receive natural gas from other sources. The Court construed the statute to require that a building protected by § 844(i) be "actively employed" for commercial purposes. *Id.* at 855, arguing that a broader interpretation would extend the statute to virtually every arson in the country.

A similar result occurred in the case of Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). In *SWANCC*, the Court considered a challenge to the Migratory Bird Rule, 51 Fed. Reg. 41217, which extended § 404(a) of the Clean Water Act (CWA), 33 U.S.C. § 1344(a) to nonnavigable, isolated wetlands. The Court held that this interpretation of the statute would raise serious constitutional questions, requiring, for instance, a close examination of precisely what activity was being regulated. Absent a clear statement from Congress that it intended the Clean Water Act to have such a broad reach, the Court found the rule was not supported by the statute. *Id.* at 173. *See also* Rapanos v. United States Army Corps of Engineers, 165 L. Ed. 2d 159, 201 (2006).

[63] 125 S. Ct. 2195 (2005).

[64] Cal. Health & Safety Code Ann. §11362.5 (West Supp. 2005) (providing for the legal possession of medical marijuana by a patient or primary care-giver, upon the written or oral recommendation of a physician).

[65] 125 S. Ct. at 2211.

[66] 317 U.S. 111 (1942).

[67] *Id.* at 125.

[68] 52 Stat. 31.

Wickard held that Congress could regulate not only the wheat sold into commerce, but also wheat retained for consumption on a farm.[69] The Court did so on the theory that the while the impact of wheat consumed on the farm on interstate commerce might be trivial, it was significant when combined with wheat from other farmers similarly situated.[70]

Based on *Wickard*, the Court in *Raich* held that Congress could consider the aggregate effect that allowing the production and consumption of marijuana for medical purposes would have on the illegal market for marijuana.[71] Of even greater concern was that diversion of marijuana grown for medicinal purposes for other uses would frustrate the federal interest in eliminating commercial transactions in the interstate market.[72] In both cases, the Court found that the regulation was within Congress's commerce power because Congress had a rational basis to determine that production of a commodity meant for home consumption, be it wheat or marijuana, could have a substantial effect on supply and demand. In addition, because exempting the use of medical marijuana could undercut enforcement of the Controlled Substances Act, the Court found that the application in this case was within Congress's authority to "make all Laws which shall be necessary and proper"[73] to effectuate its powers.

The Fourteenth Amendment

Another significant source of congressional power is § 5 of the Fourteenth Amendment. The Fourteenth Amendment provides that states shall not deprive citizens of "life, liberty or property" without due process of law nor deprive them of equal protection of the laws. Section 5 provides that Congress has the power to legislate to enforce the amendment.

The Fourteenth Amendment represented a significant shift of power in the nation's federal system. Until the passage of the Fourteenth Amendment, the Constitution was limited to establishing the powers and limitations of the federal government. However, the amendments passed immediately after the Civil War (the Thirteenth,[74] Fourteenth, and Fifteenth[75] Amendments), dramatically altered this regime. Passage of these amendments subjected a state's control over its own citizens to oversight by either the federal judiciary or Congress. The most significant impact of the Fourteenth Amendment has been its implementation by the federal courts, as state legislation came under scrutiny for having violated due process or equal protection. However, Congress has also seen fit to exercise its power under the Fourteenth Amendment to address issues such as voting rights and police brutality.

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[69] *Id.* at 128-29.

[70] *Id.* at 127.

[71] 125 U.S. at 2207.

[72] *Id.*

[73] U.S. Const., Art. I, § 8.

[74] U.S. Const., Amend. XIII (prohibiting slavery).

[75] U.S. Const., Amend. XV (voting rights).

The scope of Congress's power under §5 of the Fourteenth Amendment, however, has been in flux over the years. In *Katzenbach v. Morgan*,[76] the Court held that §5 of the Fourteenth Amendment authorized Congress not just to enforce the provisions of the Fourteenth Amendment as defined by the courts, but to help define its scope. In *Katzenbach*, the Court upheld a portion of the Voting Rights Act of 1965 that barred the application of English literacy requirements to persons who had reached 6th grade in a Puerto Rican school taught in Spanish. In upholding the statute, the Court rejected the argument that Congress's power to legislate under the Fourteenth Amendment was limited to enforcing that which the Supreme Court found to be a violation of that amendment. Rather, the Court held that Congress could enforce the Fourteenth Amendment by "appropriate" legislation consistent with the "letter and spirit of the constitution."

The rationale for this holding appears to be that Congress has the ability to evaluate and address factual situations that it determines may lead to degradation of rights protected under the Fourteenth Amendment. This is true even if a court would not find a constitutional violation to have occurred. In fact, what the Court appeared to have done was to require only that Congress establish a rational basis for why the legislation was necessary to protect a Fourteenth Amendment right.

Subsequent Supreme Court cases, however, have limited the reach of *Katzenbach*. In *Oregon v. Mitchell*,[77] the Court struck down a requirement that the voting age be lowered to 18 for state elections. In prohibiting Congress from dictating the voting age for state elections, a splintered Court appears to have supported Congress's power to pass laws that protect Fourteenth Amendment rights against state intrusions, but rejected the ability of Congress to extend the substantive content of those rights. As 18-year-olds are not a protected class under the Fourteenth Amendment, the Court found that Congress was attempting to create, rather than protect, Fourteenth Amendment rights.

More recently, in the case of *Flores v. City of Boerne*,[78] the Court struck down the Religious Freedom Restoration Act (RFRA) as beyond the authority of Congress under §5 of the Fourteenth Amendment. For many years prior to the passage of RFRA, a law of general applicability restricting the free exercise of religion, to be consistent with the Freedom of Exercise Clause of the First Amendment, had to be justified by a compelling governmental interest. However, in the 1990 case of *Oregon v. Smith*,[79] the Court had lowered this standard. The *Smith* case involved members of the Native American Church who were denied unemployment benefits when they lost their jobs for having used peyote during a religious ceremony. The *Smith* case held that neutral generally applicable laws may be applied to religious practices even if the law is not supported by a compelling governmental interest. RFRA, in response, was an attempt by Congress to overturn the *Smith* case, and to

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[76] 384 U.S. 641 (1966).

[77] 400 U.S. 112 (1970).

[78] 521 U.S. 507 (1997).

[79] 494 U.S. 872 (1990).

require a compelling governmental interest when a state applied a generally applied law to religion

The *City of Boerne* case arose when the City of Boerne denied a church a building permit to expand, because the church was in a designated historical district The church challenged the zoning decision under RFRA. The Supreme Court reiterated that §5 of the Fourteenth Amendment gave Congress the power to enforce existing constitutional protections, but found that this did not automatically include the power to pass any legislation to protect these rights Instead, the Court held that there must be a "congruence and proportionality" between the injury to be remedied and the law adopted to that end For instance, the Court's decision in *Katzenbach v Morgan* of allowing the banning of literacy tests was justified based on an extensive history of minorities being denied suffrage in this country In contrast, the Court found no similar pattern of the use of neutral laws of general applicability disguising religious bigotry and animus against religion. Rather than an attempt to remedy a problem, RFRA was seen by the Court as an attempt by Congress to overturn an unpopular Supreme Court decision The law focused on no one area of alleged harm to religion, but rather just broadly inhibited state and local regulations of all types. Consequently, the Court found RFRA to be an overbroad response to a relatively nonexistent problem

The scope of the enforcement power under § 5 of the Fourteenth Amendment also has become important in cases where the Court has found that Congress has overreached its power under other provision of the Constitution, or is limited by some provision thereof For instance, as discussed in detail below, the Supreme Court has held that the Eleventh Amendment and state sovereign immunity generally prohibit individuals from suing states for damages under federal law.[80] However, the Supreme Court has also held that Congress can abrogate state sovereign immunity under the Fourteenth Amendment.[81] This means that in many cases, litigants suing states will have to find a Fourteenth Amendment basis for federal legislation in order to defeat an Eleventh Amendment defense For instance, a significant amount of federal legislation is clearly supported by the commerce clause, but it might not be supported under §5. Recently, the Court decided two cases that illustrate the difficulties of establishing Fourteenth Amendment authority for such legislation

In *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board*,[82] the Supreme Court considered an unfair competition suit brought by a New Jersey savings bank against the state of Florida. The New Jersey savings bank had developed a patented program where individuals could use a certificate of deposit contract to save for college The state of Florida set up a similar program, and the College Savings Bank sued Florida for false and misleading advertising under a

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[80] See notes 90-104 and accompanying text, *infra*

[81] Seminole Tribe of Florida v Florida, 517 U S 44, 65-66 (1996), *See* discussion *infra* notes 95-98 and accompanying text

[82] 527 U S 666 (1999).

provision of the Trademark Act of 1946 (Lanham Act),[83] alleging that Florida had made misleading representations about its own product.

The Court first noted that under *Seminole Tribe of Florida v. Florida*, Article I, powers such as the power to regulate commerce were insufficient to abrogate Eleventh Amendment immunity. Thus, the Court next considered whether the Lanham Act could be characterized as an exercise of Congress's power under §5 of the Fourteenth Amendment. Although the Fourteenth Amendment provides that no state shall "deprive a person of ... property ... without due process of law," the Court found that the unfair trade in question, which consisted of allegedly inaccurate statements made by the state of Florida about its own saving program, did not infringe on any exclusive property right held by the College Savings Bank. As the Court found that Congress had not established an authority under the Fourteenth Amendment to abrogate the state's immunity, the College Savings Bank could not proceed against the state of Florida for unfair trade practices.

Even if a property interest is established, it would still need to be determined that Congress had the authority to protect that property interest under the Fourteenth Amendment. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[84] the Court, in a decision concerning the same parties as the case discussed above, considered whether the College Savings Bank could sue the state of Florida for patent infringement. Congress had passed a law specifically providing that states could be sued for patent violations,[85] citing three sources of constitutional authority: the Article I Patent Clause,[86] the Article 1 Interstate Commerce Clause,[87] and §5 of the Fourteenth Amendment. As the Court had previously precluded abrogation of sovereign immunity through the exercise of Article I powers, the question became whether Congress had the authority to pass patent legislation under §5 of the Fourteenth Amendment.

Unlike the previous case, the Court found that, under a long line of precedents, patents were considered property rights. However, the Court had to further consider whether the protection of such a property right under §5 of the Fourteenth Amendment was "appropriate" under its ruling in *City of Boerne*. Consequently, the Court evaluated whether a federal right to enforce patents against states was appropriate remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment for patent owners. Specifically, the Court sought to evaluate whether unremedied patent infringement by states rose to the level of a Fourteenth Amendment violation that Congress could redress.

The Court noted that Congress had failed to identify a pattern of patent infringement by the states, and that only a handful of patent infringement cases had

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[83] 15 U.S.C. § 1125(a).

[84] 527 U.S. 627 (1999).

[85] Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U.S.C. §§ 271(a).

[86] U.S. Const. Art. 1, § 8, cl. 8.

[87] U.S. Const. Art. 1, § 8, cl. 3.

been brought against states in the last 100 years. The Court also noted that Congress had failed to establish that state remedies for patent infringement were inadequate for citizens to seek compensation for injury. In fact, the state of Florida argued that no constitutionally based violation had occurred, as it had procedures in place that would provide the necessary due process for patent infringement by the state to be challenged. Consequently, the Court found that the exercise of §5 of the Fourteenth Amendment in this context would be out of proportion to the remedial objective.

The Court engaged in a similar analysis, with like results, in evaluating the application of age discrimination laws to the states. In *Kimel v. Florida Board of Regents*,[88] the Court noted that the Age Discrimination in Employment Act of 1967, while a valid exercise of Congress's commerce power, could not be applied to the states unless Congress also had the power to enact it under §5 of the Fourteenth Amendment. The *Kimel* Court held, however, that age is not a suspect class, and that the provisions of the ADEA far surpassed the kind of protections that would be afforded such a class under the Fourteenth Amendment. Further, the Court found that an analysis of Congress's ability to legislate prophylactically under section §5 required an examination of the legislative record to determine whether the remedies provided were proportional and congruent to the problem. A review by the Court of the ADEA legislative record found no evidence of a pattern of state governments discriminating against employees on the basis of age. Consequently, the Court held that a state could not be liable for damages under the ADEA.

Similarly, the application of Title I of the Americans with Disabilities Act (ADA) to states was considered in the case of the *Board of Trustees v. Garrett*,[89] again with similar result. In *Garrett*, the Court evaluated whether two plaintiffs could bring claims for money damages against a state university for failing to make reasonable employment accommodations for their disabilities; one plaintiff was under treatment for cancer, the other for asthma and sleep apnea. Although disability is not a suspect class and thus discrimination is evaluated under a rational basis test, the Court had previously shown a heightened sensitivity to arbitrary discrimination against the disabled.[90] Further, Congress had made substantial findings regarding the pervasiveness of such discrimination. However, the Supreme Court declined to consider evidence of discrimination by either the private sector or local government, and dismissed the examples that did relate to the states as unlikely to rise to the level of constitutionally "irrational" discrimination. Ultimately, the Court found that no pattern of unconstitutional state discrimination against the disabled had been established, and that the application of the ADA was not a proportionate response to any pattern that might exist.

However, the Court reached a different conclusion in the case of *Nevada Department of Human Resources v. Hibbs*.[91] In the *Hibbs* case, an employee of the Nevada Department of Human Resources had a dispute with the Department

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[88] 528 U.S. 62 (2000).

[89] 531 U.S. 356 (2001).

[90] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

[91] 538 U.S. 721 (2003).

regarding how much leave time he had available under the Family and Medical Leave Act of 1993 (FMLA). The FMLA requires employers to provide employees up to 12 weeks of unpaid leave to care for a close relative with a "serious health condition."[92] In *Hibbs*, the Court held that Congress had the power to abrogate a state's Eleventh Amendment immunity under the FMLA, so that a state employee could recover money damages. The Court found that Congress had established significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the states, and that history was sufficient to justify the enactment of the legislation under § 5. The standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than the rational-basis test, such was at issue in *Kimel* and *Garrett*, so it was easier for Congress to show a pattern of state constitutional violations.

Even where the Eleventh Amendment and state sovereign immunity are not at issue, the Court may be asked to consider whether the Fourteenth Amendment establishes a sufficient basis for a federal law that does not appear to have a constitutional basis elsewhere in the Constitution. For instance, in *United States v Morrison*,[93] discussed previously,[94] the Court found that Congress, in creating a federal private right of action for victims of gender-motivated violence, had exceeded its authority under the Commerce Clause. Consequently, the plaintiff in that case made the alternate argument that the federal private right of action could be sustained under § 5 of the Fourteenth Amendment.

This argument, however, suffered from two major defects. First, the Court has long held that the Fourteenth Amendment provides Congress with the authority to regulate states but not individuals.[95] In *Morrison*, however, the civil case had been brought against the individuals alleged to have engaged in the offense. The plaintiff attempted to avoid this problem by arguing that there is pervasive bias in various state justice systems against victims of gender-motivated violence, and that providing a federal private right of action was an appropriate means to remedy this "state action."

However, the Court rejected this argument, finding that the remedy did not meet the *City of Boerne* test of "congruence and proportionality to the injury to be prevented or remedied and the means adopted to that end."[96] Because the federal private right of action was not aimed at the allegedly discriminatory actions by state officials, but was instead directed against the individual engaging in the violence itself, the Court found that the action could not be supported by reference to the Fourteenth Amendment.[97]

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[92] 29 U.S.C. § 2612(a)(1)(C).

[93] 529 U.S. 598 (2000).

[94] *See supra* notes 60-61 and accompanying text.

[95] *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[96] 521 U.S. at 526.

[97] 529 U.S. at 626.

The Court again considered the issue of Congress's power under § 5 of the Fourteenth Amendment in *Tennessee v. Lane*.[98] In the *Lane* case, two paraplegic plaintiffs alleged that the state of Tennessee and several of its counties violated Title II of the ADA, which requires that the disabled be provided accessible public services, programs, and activities, by failing to provide physical access to state courts.[99] The Court held that Title II, as applied to this right of access to the courts, was a proper exercise of Congress's authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity. Similar to its holdings in the *Garrett* and *Hibbs* cases, the Court found that Congress had established sufficient evidence of the sustained denial of persons with disabilities of access to the courts.[100]

In applying the *Boerne* congruence and proportionality test, the Court in *Lane* distinguished the rights Congress intended to protect in Title II (access to public services, programs, and activities) from the Title I employment rights that had been struck down in *Garrett*. While both Titles I and II were intended to address unequal treatment of the disabled (which is only a constitutional violation when it is irrational), the Court held that Title II was also intended to reach the more rigorously protected rights of the Due Process Clause of the Fourteenth Amendment, such as the right of access to the courts.[101] The Court stated that the due process rights Congress sought to protect under Title II required a standard of judicial review at least as searching as the sex-based classifications the Court considered in *Hibbs*.[102] The limited nature of Title II as a remedy for the denial of the right of access to courts also informed the Court's holding that the measure is a valid prophylactic remedy.[103]

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[98] 541 U.S. 509 (2004).

[99] One plaintiff in *Lane* claimed he was unable to appear to answer criminal charges on the second floor of a courthouse that had no elevator. The second plaintiff, a certified court reporter, claimed she was denied the opportunity both to work and to participate in the judicial process because she was unable to access numerous county courthouses.

[100] The Court cited congressional evidence that legislative attempts preceding Title II inadequately addressed the problem of patterned unconstitutional treatment in access to the courts. 541 U.S. at 526.

[101] The Court held that it need not examine Title II as a whole when evaluating the remedy's congruence and proportionality to the injury of disability discrimination in access to the courts. The relevant inquiry solely concerned Title II's scope as applied to the rights associated with access to judicial services. The Court cited as precedent for this limited application approach the *Garrett* case, in which it considered only Title I of the ADA for purposes of Fourteenth Amendment analysis. Based on this narrow scope of inquiry, the Court determined that both the pattern of past discrimination in access to the courts and the failure of previous legislative attempts to remedy the injury were sufficient to hold that Title II is a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.

[102] 541 U.S. at 529. As noted by Chief Justice Rehnquist in dissent, 541 U.S. at 541-42 (Rehnquist, C.J., dissenting), the congruence and proportionality analysis in the majority opinion in *Lane* did not limit itself to historical examples of the disabled being denied due process, but also cited a history of disparate treatment in other less protected areas. *See id.* at 524-25.

[103] Title II does not require states to compromise the integrity of public programs or make unduly burdensome changes to public facilities. 541 U.S. at 532. Rather, states need only

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Congress's authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity appears strongest when the focus of the prophylactic measure at issue is conduct that actually violates a constitutional right. In *United States v. Georgia*,[104] a disabled state prison inmate who used a wheelchair for mobility alleged that the state of Georgia violated Title II of the ADA in relation to his conditions of confinement. The Court reiterated its holding in *Lane* that Title II is a constitutional exercise of Congress's Fourteenth Amendment powers. It went on to state that Title II was valid as applied to the plaintiff's cause of action, because he alleged independent violations under § 1 of the Fourteenth Amendment concerning his prison treatment.[105]

The Tenth Amendment

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." While this language would appear to represent one of the most clear examples of a federalist principle in the Constitution, it has not had a significant impact in limiting federal powers. Initially, the Supreme Court interpreted the Tenth Amendment to have substantive content, so that certain "core" state functions would be beyond the authority of the federal government to regulate. Thus, in *National League of Cities v. Usery*,[106] the Court struck down federal wage and price controls on state employees as involving the regulation of core state functions.[107] The Court, however, overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[108] In sum, the Court in *Garcia* seems to have said that most disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions, and that the states should look for relief from federal regulation through the political process.[109] This appeared to have ended the Court's attempt to substantively limit federal government regulation of the states.

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[103] (...continued)
take reasonable measures to comply with Title II regulations. *Id.*

[104] 125 S. Ct. 877 (2006).

[105] *Id.* at 881.

[106] 426 U.S. 833 (1976).

[107] In *National League of Cities v. Usery*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was undoubtedly within the scope of the Commerce Clause, but it cautioned that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

[108] 469 U.S. 528 (1985). Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations" in areas of traditional governmental functions had proven impractical and that the Court in 1976 had "tried to repair what did not need repair."

[109] *See also South Carolina v. Baker*, 485 U.S. 505 (1988).

The Court soon turned, however, to the question of how the Constitution limits the process by which the federal government regulates the states. In *New York v United States*,[110] Congress had attempted to regulate in the area of low-level radioactive waste. In a 1985 statute, Congress provided that states must either develop legislation on how to dispose of all low-level radioactive waste generated within the state, or the state would be forced to take title to such waste, which would mean that it became the state's responsibility. The Court found that although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it only had the power to regulate the waste directly. Here, Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the state to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to "commandeer" the legislative process of the states. In the *New York* case, the Court found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.

A later case presented the question of the extent to which Congress could regulate through a state's executive branch officers. This case, *Printz v. United States*,[111] involved the Brady Handgun Act. The Brady Handgun Act required state and local law enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase. This portion of the act was challenged under the Tenth Amendment, under the theory that Congress was without authority to "commandeer" state executive branch officials. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress's power, and consequently a violation of the Tenth Amendment.

Although the federal government is prohibited from commandeering either the legislature or executive branch of a state, this does not appear to be the case with state judicial branches. The federal judicial system and the state judicial system were not intended to be as separate as the other branches of government, and the Supremacy Clause of the Constitution explicitly provides that state courts must follow federal law, even if it overrides state laws or constitutions.[112] So, there appears to be less of a concern regarding the "commandeering" of state courts.

A key distinction between constitutional "substantive regulation" and unconstitutional "commandeering" appears to be whether or not the federal mandate in question is regulating state activities or whether it is seeking to control the manner in which states regulate private parties. Thus, for instance, the Court recently held in *Reno v. Condon*[113] that the Driver's Privacy Protection Act of 1994, which regulates the sale of personal information gathered from persons seeking drivers

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[110] 505 U.S. 144 (1992).

[111] 521 U.S. 898 (1997).

[112] "The Constitution and the Law of the United States . . . shall be the Supreme Law of the Land, and the Judges of every State shall be bound thereby . . . ." U.S. Const., Art. VI, cl. 2.

[113] 528 U.S. 141 (2000).

licenses, was substantive regulation, not commandeering. In that case, the Court found that the state was not being directed on how to regulate its citizens, but rather on how to treat information that had been elicited from those citizens. However, because the regulation affected both state governments and private resellers of such information, the Court reserved the question as to whether a law, which only regulated state activities, would be constitutionally suspect.

Eleventh Amendment and State Sovereign Immunity

The Eleventh Amendment and state sovereign immunity provide an example of the complicated interaction between the powers of the federal government, the state, and the individual. The basic issue to be addressed here is the extent to which individuals can sue a state under federal law.[114] The answer to this question may vary based on a number of factors, including what law the suit is being brought under, whether the state has taken action to make itself amenable to such law, and what relief is being sought.

The starting point for such a discussion is usually the Eleventh Amendment. The Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." The actual text of the Amendment appears to be limited to preventing citizens from bringing diversity cases against states in federal courts. However, the Supreme Court has expanded the concept of state sovereign immunity to reach much further than the text of the amendment.

The Eleventh Amendment, the first amendment to the Constitution after the adoption of the Bill of Rights, was passed as a response to the case of *Chisholm v Georgia*.[115] Immediately after the adoption of the Constitution, a number of citizens filed cases in federal court against states. One of these, *Chisholm*, was a diversity suit filed by two citizens of South Carolina against the State of Georgia to recover a Revolutionary War debt. In *Chisholm*, the Supreme Court noted that Article III of the Constitution specifically grants the federal courts diversity jurisdiction over suits "between a State and citizens of another State."[116] Thus, the Court held that this

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[114] It should be noted that not all suits in which a state is involved is a "suit" against a state. In Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004), the Court addressed state sovereign immunity in the context of bankruptcy proceedings. In that case, the Court addressed whether Eleventh Amendment immunity extended to an adversary proceeding initiated by a debtor seeking an undue hardship discharge of her state-held student loan debt. The Court held that the proceeding did not constitute a suit against the state for purposes of the Eleventh Amendment. The Court noted that the bankruptcy petition in question was an *in rem* proceeding, so that the court's jurisdiction was over the petitioner's debt, rather than over her person or the state. *Id.* at 448. Thus, the federal bankruptcy court's exercise of jurisdiction over the state-held debt did not infringe upon the state's sovereignty immunity. *Id.* at 450.

[115] 2 U.S. (Dall.) 419 (1793).

[116] U.S. Const., Art. III, §2.

grant of jurisdiction authorized the private citizen of one state to sue another state in federal court without that state's consent.

The states were outraged that such a suit could be brought in federal court, protesting that the drafters of the Constitution had promised the states they would not be sued by their debtors in federal courts. Almost immediately after the decision of the *Chisholm* cases, resolutions were introduced in Congress to overturn it, the end result being the Eleventh Amendment. The amendment ensured that a citizen of one state could not sue another state in federal court — in other words, a citizen could not sue under federal diversity jurisdiction without a state's permission.

However, even after the Eleventh Amendment was passed, a number of cases were filed against states by private citizens, with jurisdiction based on federal question rather than diversity. Under this reasoning, if a citizen of a state sued his or her own state in federal court, the prohibition of the Eleventh Amendment would not apply. Consequently, for a number of years after the passage of the Eleventh Amendment, this type of case was entertained by the federal courts. However, this line of cases was ended by the case of *Hans v. Louisiana*.[117]

In *Hans v. Louisiana*, the Court provided for an interpretation of the Eleventh Amendment that allowed the Court to move beyond the literal text of that amendment. Under the reasoning of the Court, the Eleventh Amendment was not so much an amendment to the original structure of the Constitution as it was an attempt to overturn a specific court decision that had misinterpreted this structure. According to this line of reasoning, the Eleventh Amendment was not an amendment, but a restoration of the original constitutional design.

Ultimately, the issue before the Court in *Hans v. Louisiana* and in subsequent cases was not the Eleventh Amendment, but the issue of state sovereign immunity. State sovereign immunity means that a state must consent to be sued in its own court system. This concept is based on early English law, which provided that the Crown could not be sued in English courts without its consent. The doctrine of sovereign immunity was in effect in the states that were in existence at the time of the drafting of the Constitution. Further, various writings by the founding fathers seemed to support the concept.[118] Thus, the issue before the Court in *Hans* was whether the grant of jurisdiction to federal courts under Article III of the Constitution had abrogated state sovereign immunity. The *Hans* Court found that Article III did not have this effect.

Although the *Hans* Court answered the issue of whether adoption of Article III of the Constitution had waived state sovereign immunity in federal courts, it left a number of questions unanswered. For instance, the question as to whether there are any instances where Congress could, by statute, abrogate a state's sovereign immunity, so that a citizen could sue a state under federal law. In *Seminole Tribe of*

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[117] 134 U.S. 1 (1890).

[118] *See* Alden v. Maine, 527 U.S. 706, 2248 (1999).

Florida v. Florida,[118] the Court seemed to answer that in most cases, such suits would not be accepted. The *Seminole* case involved the Indian Gaming Regulatory Act of 1988, which provided Indian tribes with an opportunity to establish gambling operations. However, to establish such gambling, the Indian tribes had to enter into a compact with the state in which they were located. The states, in turn, were obligated to negotiate with the Indian tribes in good faith, and this requirement was made enforceable in federal court. Thus, the question arose as to whether the tribes could sue the states under the Eleventh Amendment.

The Court in *Seminole* found it important to establish what constitutional authority was being exercised by the passage of the Indian Gaming Law. The Court determined that the power being exercised was the Indian Commerce Clause,[120] which is found in Article I. The Court had found previously in *Pennsylvania v. Union Gas*,[121] that the Commerce Power, as a plenary power, was so broad that of necessity it required the ability to abrogate state sovereign immunity. In *Seminole*, however, the Court overturned *Union Gas*, holding that as the Eleventh Amendment was ratified after the passage of the Constitution and Article I, it was a limitation on Congress's authority to waive a state's sovereign immunity under that Article. The Court did indicate, however, that Congress can abrogate state sovereignty under the Fourteenth Amendment. While the logic behind this distinction is unclear,[122] it means that in many cases, litigants suing states will try to find a Fourteenth Amendment basis for federal legislation to defeat an Eleventh Amendment defense.

A question left unanswered by the *Hans* decision was whether the Eleventh Amendment, which prohibited Congress from abrogating a state's sovereign immunity in federal court, extended to a state's own courts. In *Alden v. Maine*,[123] the Supreme Court found that the same principles of sovereign immunity identified in

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[118] 517 U.S. 44 (1996).

[120] U.S. Const., Art. I, § 8, cl. 3.

[121] 491 U.S. 1 (1989).

[122] One apparent argument is that the Fourteenth Amendment was passed after the Eleventh Amendment and thus, unlike legislative powers found in Article I of the Constitution, it can be seen as an alteration of the restrictions of the Eleventh Amendment. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 65-66 (1996). However, as is discussed in detail below, the Supreme Court has held that state sovereign immunity preceded and predated the Constitution. Alden v. Maine, 527 U.S. 706, 2248 (1999). Consequently, all the Articles of the Constitution could arguably be seen as altering the restrictions of the state sovereign immunity.

Another argument made by the Court in *Seminole* is that the Fourteenth Amendment was designed to alter the pre-existing balance between state and federal power at the time of its passage. This argument is more plausible, but is still difficult to differentiate between Congress's power under the Fourteenth Amendment and Congress's power under the Articles of the Constitution. Like the Fourteenth Amendment, the Articles of the Constitution were clearly intended to alter the balance between state and federal power at the time of the passage of the Constitution, which included state sovereign immunity. This is exemplified by the Supremacy Clause, U.S. Const. Art. VI, cl. 2, which provides that laws passed under the Articles of the Constitution would be supreme over state law.

[123] 527 U.S. 706 (1999).

Hans would prevent Congress from authorizing a state to be sued in its own courts without permission. As in *Hans*, the Court acknowledged that the literal text of the Eleventh Amendment does not prohibit such suits, as its language addresses only suits brought in federal courts. Consequently, the Court relied instead on the proposition that sovereign immunity is a "fundamental postulate" of the constitutional design, and is not amenable to congressional abrogation. The same reasoning that prohibited these suits from being brought in federal court, a deference to the "respect and dignity" of state sovereignty, led the Court to conclude that it would be anomalous to allow such cases to be brought instead in state court.

In *Federal Maritime Comm'n v. South Carolina State Ports Authority*, the Court addressed the issue of whether state sovereign immunity extended to proceedings before federal agencies.[124] In this case, the South Carolina State Ports Authority denied a cruise ship permission to berth at the state's port facilities in Charleston, South Carolina, contending that the primary purpose of the cruise was for gambling. The cruise ship company, Maritime Services, filed a claim with the Federal Maritime Commission (FMC) arguing that South Carolina had discriminated against it in violation of the Shipping Act of 1984 and sought, among other things, damages for loss of profits.[125] The Port Authority, however, successfully moved to dismiss the complaint, arguing that it was inconsistent with the concept of state sovereign immunity.

In reviewing the case, the Court analogized between the FMC's quasi-judicial proceedings and traditional judicial proceedings, while noting that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[126] Consequently, the Court agreed that state sovereign immunity bars the FMC from adjudicating damage claims made by a private party against a nonconsenting State.[127] In dissent, however, Justice Breyer noted that agency administrative proceedings are not judicial proceedings and that the ultimate enforcement of such proceedings in a court is done by the federal agency, to which state sovereign immunity does not apply. Thus, while an agency remains capable of enforcement actions against states in federal court, it cannot use its own adjudicative process to determine whether to do so, but must rely on its

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[124] 122 S. Ct. 1864 (2002).

[125] 46 U.S.C. App. § 1701 (1994 & Supp. V).

[126] 122 S. Ct. at 1874.

[127] The Court noted that "[there are] numerous common features shared by administrative adjudications and judicial proceedings." 122 S. Ct. at 1872. "[F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record." *Id.*

investigatory powers.[128] According to Justice Breyer, "[t]he natural result is less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement."[129]

The Spending Clause

It should be noted that in many instances, the federal government still has the ability to influence state behavior despite the constitutional limits discussed above.[130] One of the more significant ways that the federal government can encourage state behavior is to impose conditions on the receipt of federal monies by the states. Considering the large amount of funds provided to states by the federal government, this represents a significant power for Congress to exercise. Further, as the concept of grant conditioning can involve waiver by the states of Tenth and Eleventh Amendment rights, these grant conditions may allow Congress to indirectly achieve compliance by a state in a way that could not be achieved directly.

The question of whether a state can be required to perform (or refrain from) certain actions was addressed in the Supreme Court case of *South Dakota v. Dole*.[131] In *Dole*, Congress enacted the National Minimum Drinking Age Amendment of 1984,[132] which directed the Secretary of Transportation to withhold a percentage of federal highway funds from states in which the age for purchase of alcohol was below 21 years. The State of South Dakota, which permitted 19-year-olds to purchase beer, brought suit arguing that the law was an invalid exercise of Congress's power under the Spending Clause to provide for the "general welfare."[133] The Supreme Court held that, as the indirect imposition of such a standard was directed toward the general welfare of the country, it was a valid exercise of Congress's spending power.

The Court noted that the grant condition did not implicate an independent constitutional bar, *i.e.*, the grant condition did not require the state to engage in an unconstitutional activity. Further, the court noted that the grant condition was not a violation of the Tenth Amendment, which generally prevents Congress from

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[128] Justice Breyer noted that after this decision "a private person cannot bring a complaint against a State to a federal administrative agency where the agency (1) will use an internal adjudication process to decide if the complaint is well founded, and (2) if so, proceed to court to enforce the law." *Id.* at 1881.

[129] *Id.*

[130] For instance, the federal government has, in some cases, made the application of federal regulatory authority contingent, so that if a state chooses to regulate in that field, the federal regulatory role is circumscribed. In many cases, this will encourage states to regulate, so that the state has closer control of the application of such regulation within the state. *See, e.g.*, 42 U.S.C. § 7410 (national air control standards not applicable upon the adoption by states of adequate air control standards).

[131] 483 U.S. 203 (1987).

[132] 23 U.S.C. §158.

[133] U.S. Const., Art. I, § 8, cl. 1 (Congress has the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").

"commandeering" state legislatures[134] and executive branch officials[135] to implement federal programs.[136] The Tenth Amendment would not apply here, the Court held, because the state officials were voluntarily cooperating in order to receive federal grants, and thus were not being directed to comply with federal mandates.

The Court did suggest, however, that there were limits to Congress's power under the Spending Clause to require states to meet certain grant conditions. First, a grant condition must be related to the particular national projects or programs to which the money was being directed.[137] In *Dole*, the congressional condition imposing a specific drinking age was found to be related to the national concern of safe interstate travel, which was one of the main purposes for highway funds being expended. Second, the Court suggested that, in some circumstances, the financial inducements offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion."[138] In *Dole*, however, the percentage of highway funds that were to be withheld from a state with a drinking age below 21 was relatively small, so that Congress's program did not coerce the states to enact higher minimum drinking ages than they would otherwise choose.

One of the more controversial potential applications of this doctrine arises when the government requires that, in order to receive a grant, a state waive its sovereign immunity to suits brought by private citizens. As discussed above, the Supreme Court has imposed significant limits on Congress's ability to abrogate state sovereign immunity. However, this does not appear to have prevented the lower courts from finding that states can be required to waive their sovereign immunity as a condition of receiving grants.

A state's sovereign immunity, is "a personal privilege which it may waive at its pleasure."[139] Thus, it is clearly possible for a state, under some circumstances, to waive sovereign immunity as a condition of receiving federal funds.[140] The Supreme

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[134] New York v. United States, 505 U.S. 144 (1992).

[135] Printz v. United States, 521 U.S. 898 (1997).

[136] It would seem that sovereign immunity is a core state power, and that requiring its waiver would raise Tenth Amendment concerns. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976)(striking down federal wage and price controls on state employees as involving the regulation of traditional state functions). As discussed previously, however, the Court has, for the time being, abandoned this line of cases. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)(concluding that the test to identify traditional governmental functions had proven impractical, and that such disputes should be resolved through the political process).

[137] 483 U.S. at 207.

[138] Id. at 211.

[139] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 674 (1999) *citing* Clark v. Barnard, 108 U.S. 436, 447 (1883).

[140] Since such a waiver must be voluntary, the Court will consider carefully whether a state has actually waived its immunity. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985). For instance, a court will generally only find a waiver to federal suit based on a state (continued..)

Court has held that "mere receipt of federal funds" is insufficient to constitute a waiver of state sovereign immunity [141] However, the Court has also held that where a federal statute contains an "unambiguous waiver" of a state's Eleventh Amendment immunity, then a state's acceptance of such funds can be an effective waiver [142]

Thus, it would appear that the waiver of sovereign immunity as a grant condition would pass constitutional muster under *Dole* Just as states may waive their Tenth Amendment rights not to be commandeered when accepting grant conditions (as noted in *Dole*), it seems generally accepted that there is no constitutional bar to a state voluntarily waiving its sovereign immunity rights [143] As a general matter, conditioning a federal grant on the voluntary waiver of state sovereign immunity does not seem to be of particular constitutional concern

Under *Dole*, however, a court would, on a case-by case basis, need to examine the level of financial burden that would be imposed on the state by the withdrawal of a particular federal grant to ensure that the condition was not coercive. Further, under *Dole*, a court would need to examine how related the purpose of the proposed bill was to the waiver of sovereign immunity in connection with a particular grant program [144] However, the Court in *Dole* indicated that it would show significant

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[140] (.continued)
statute if a state makes a "clear declaration" that it intends to submit itself to federal jurisdiction. Great Northern Life Ins. Co. v Read, 322 U S 47, 54 (1944). *See also* Pennhurst State School and Hospital v Halderman, 465 U S 89, 99 (1984) (State's consent to suit must be "unequivocally expressed)

[141] Atascadero State Hospital v Scanlon, 473 U S 234 (1985) In *Atascadero State Hospital*, the Court held that if a statute "manifests a clear intent to condition participation in the programs funded under the Act on a State's waiver of its constitutional immunity," federal courts would have jurisdiction over claims against states accepting federal funds Id at 247

[142] Lane v Pena, 518 U S 187, 200 (1996) For instance, Section 504 of the Rehabilitation Act of 1973, 29 U S C § 701, *et seq* provides that "a state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 ..." 42 U.S C § 2000d 7(a)(1) Consequently, a number of United States Courts of Appeals have found that receipt of federal funding subject to this condition was sufficient to waive a state s sovereign immunity Keslew v Commonwealth of Pennsylvania Department of Corrections, 302 F 3d 161 (3rd Cir. 2002), Nihiser v. Ohio EPA, 269 F 3d 626 (6th Cir 2001), Jim C. v. United States, 235 F 3d 1079 (8th Cir 2000), Stanley v Litscher, 213 F 3d 340, 344 (7th Cir 2000), Pederson v La St Univ , 213 F 3d 858, 875-76 (5th Cir 2000), Sandoval v Hagan, 197 F 3d 484, 493-94 (11th Cir 1999), rev'd on other grounds, 532 U S 275 (2001), Litman v George Mason Univ., 186 F 3d 544, 554 (4th Cir. 1999), Clark v California, 123 F.3d 1267, 1271 (9th Cir 1997)

[143] Susan M Luken, *Irreconcilable Differences the Spending Clause and the Eleventh Amendment Limiting Congress's Use of Conditional Spending to Circumvent Eleventh Amendment Immunity*, 70 U Cin L Rev 693 (2002), Michael T Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity. The Conditional Spending Power (and Beyond)*, 29 Hastings Const L.Q 439 (2002), Litman v George Mason University, 186 F 3d 544 (4th Cir 1999), Jim C v United States, 235 F 3d 1079 (8th Cir 2000)

[144] *See* id at 1084 (Bowman, J, dissenting) (arguing that waiver of sovereign immunity was (continued. .)

deference to Congress in determining whether a grant condition relates to an underlying federal program, and this requirement does not appear to have been of concern to lower courts considering waiver of sovereign immunity as a grant condition [145]

Conclusion

It would appear that the status of the state in the federal system has been strengthened by recent Supreme Court opinions. Although the Court has not scaled back the federal government's substantive jurisdiction significantly, it has to some extent prevented the expansion of Congress's power under the Commerce Clause and under §5 of the Fourteenth Amendment. Further it has created a variety of obstacles as to how these powers can be executed, forbidding Congress under the Tenth Amendment from commandeering the authority of state legislative and executive branches, and limiting the authority of Congress to abrogate state sovereign immunity. Ultimately, however, Congress retains significant powers to influence state behavior, such as through the Spending Clause, and, under the Supremacy Clause, Congress may require the enforcement of its laws in both state and federal court.

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[144] (. continued)
not related to purpose of education grants)

[145] *See generally* Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999), Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000).